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In The

Supreme Court of the United States

October Term, 1991

ROBERT E. HATFIELD,

Petitioner,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Railroad Safety Act preempts a negligence claim against a railroad for failure to install additional traffic control devices at a grade crossing when the responsible state authority has scheduled the crossing for eventual upgrade but, at the time of the accident, has not approved installation.

RULE 29.1 STATEMENT

Burlington Northern Inc. is the parent company of Respondent Burlington Northern Railroad Company. The partially owned subsidiaries of Respondent Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Longview Switching Company
M T Properties, Inc.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
TTX Company
The Wichita Union Terminal Railway Company

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RESPONDENT'S BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Petitioner Robert E. Hatfield filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Petition") on June 8, 1992. Respondent Burlington Northern Railroad Co. hereby acquiesces in the Petition for Writ of Certiorari and asks that the argument of this case be heard in tandem with *CSX Transportation, Inc. v. Easterwood*, Nos. 91-790, 91-1206, *cert. granted*, 60 U.S.L.W. 3878 (June 29, 1992).

STATEMENT OF THE CASE

This case presents the question of whether the Federal Railroad Safety Act ("FRSA") preempts a negligence claim against a railroad for failure to install additional traffic control devices at a grade crossing when the responsible state authority has scheduled the crossing for eventual upgrade but, at the time of the accident, had not yet approved or authorized installation. This Court has recognized the significance of the general controversy over federal preemption of state law with regard to railroad grade crossings by granting certiorari in *Easterwood*.

Unlike *Easterwood*, however, which presents several preemption issues in a different factual context, this case focuses on the question of when preemption occurs in a situation where an accident occurs *after* the State has

determinec a crossing should be eventually upgraded but *before* the State has actually decided upon the appropriate traffic control device to be installed and before the State has authorized or approved installation by the railroad. Because these circumstances constitute perhaps the paradigm case under the federal scheme, they provide an extremely useful factual model for this Court's analysis of the scope of preemption and a desirable vehicle for providing guidance to large numbers of lower federal and state courts. Respondent therefore acquiesces in the Petition for Writ of Certiorari in this matter and respectfully requests that argument of this case be heard in tandem with *Easterwood*.

A. Federal and State Regulatory Scheme

Enacted in 1970, the FRSA mandated a broad scheme of rail safety regulation. To promote national uniformity, Congress expressly preempted states' regulation of any area of rail safety in which the Secretary of Transportation had taken action. 45 U.S.C. § 434 (1988). It declared that "laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." *Id.* States thus are permitted to "adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." *Id.*

At the same time that the FRSA mandated broad preemption in the area of railroad safety, it launched a comprehensive plan to reduce safety hazards at railroad

grade crossings throughout the United States. To ensure national uniformity, the Federal Highway Administration ("FHWA") adopted the Manual on Uniform Traffic Control Devices for Streets and Highways ("MUTCD") as "the national standard" for all traffic control devices. 23 C.F.R. § 655.603(a) (1991). The Manual provides explicit direction concerning responsibilities for selection of traffic control devices at railroad grade crossings, the selection process itself, the type of devices to be installed and the design, placement, operation and maintenance of the devices as part of a totally integrated traffic control system at the crossing, taking into consideration the particular circumstances at each crossing. To accomplish that end the MUTCD sets forth an explicit scheme of planning and prioritization of problem crossings by states for upgrade as needed.

The Manual provides that "[t]he responsibility for the design, placement, operation and maintenance of traffic control devices rests with the governmental body or official having jurisdiction." MUTCD, ¶ 1A-3. For railroad grade crossings, "[t]he determination of need and selection of devices . . . is made by the public agency with jurisdictional authority." *Id.* at ¶ 8A-1. Subject to such determination and selection, "the design, installation and operation shall be in accordance with the national standards contained herein." *Id.* The Manual further directs that, before a new or modified traffic control system is installed at a grade crossing, "approval is required from the appropriate agency within a given State." *Id.* at

¶ 8D-1. The determination of need for a new or modified system must be based on an engineering and traffic investigation at the particular crossing. *Id.* All states were required to adopt the MUTCD and its revisions or forego federal highway funding. *See* 23 C.F.R. § 655.603(b)(1).

In Kansas, which for many years has received federal highway funding pursuant to the Federal Highway Safety Act, 23 U.S.C. § 101 *et seq.*, the legislature directed the state secretary of transportation to adopt a manual and specifications for a uniform system of traffic-control devices which "shall correlate with and so far as possible conform to the system set forth in the most recent edition of the manual on uniform traffic-control devices for streets and highways and other standards issued or endorsed by the federal highway administrator." K.S.A. 8-2003 (enacted in 1974).[2]

B. Statement of Facts

The Haverhill Road crossing in Butler County, Kansas – at which the accident in this case occurred – was first inventoried by the Kansas Department of Transportation ("KDOT") on May 1, 1972. Pet. App. at 14, 17. KDOT did not recommend any improvements to the crossing as a result of that survey. *Id.*

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[2] Kansas law additionally provides that "[n]o person shall place, maintain or display upon or in view of any highway any unauthorized sign, signal, marking or device which purports to be or is an imitation of or resembles an official traffic-control device or railroad sign or signal." K.S.A. 8-1512(a). A prohibited sign, signal or marking "is hereby declared to be a public nuisance." *Id.* 8-1512(d).

Pursuant to a request from Butler County officials, KDOT conducted an on-site inspection of the crossing on July 23, 1981. *Id.* Again, KDOT did not recommend any improvements to the crossing as a result of that inspection. *Id.* KDOT updated its information regarding the crossing in February 1984. *Id.* As a result of this updated information, KDOT placed the crossing on its fiscal year 1985 improvement list. *Id.* Following a May 1, 1985 on-site inspection, KDOT scheduled the crossing for eventual upgrade, *id.*, subject to approval by the county, the execution of an agreement for installation, and final approval and authorization to proceed by KDOT.

During the period of time required for final approval and authorization by KDOT and before the installation of the additional traffic control devices, Petitioner Robert E. Hatfield was injured in a collision on September 29, 1987 when the truck he was driving collided with a Burlington Northern Railroad Co. ("BN") train at the Haverhill Road crossing. *Id.* at 16. At the time of the collision, the traffic control system for the crossing consisted of standard crossbucks on each approach, an advance warning sign, painted roadway markings and speed bumps (rumble strips).

Subsequent to the collision, on December 11, 1987, Butler County officials informed KDOT by letter of its agreement to participate in the installation of signals at the crossing. *Id.* at 17. On December 28, 1987, KDOT approved a project to install straight post signals at the crossing and provided BN with a proposed agreement to install the signals and preliminary plans for their installation. *Id.* at 17-18. On March 2, 1988, funding was obligated for the project. *Id.* at 18.

Shortly thereafter, on March 11, 1988, KDOT authorized BN to order the necessary materials for the project, but cautioned BN that "the actual installation of the warning devices cannot be undertaken until the agreements are executed by all parties and we have authorized you to proceed." *See* Appendix to this Response at App. 2. On March 21, 1988, KDOT, for the first time, authorized BN by letter to begin work installing the signals. Pet. App. at 18. One year later, on March 22, 1989, KDOT issued a notice of acceptance of the improvements. *Id.*

C. Statement of Proceedings

On September 11, 1989, plaintiff brought this action against BN in state court in Butler County, alleging, among other things, that BN was negligent in failing to install active warning devices at the crossing to warn approaching motorists of train traffic. BN removed the action to federal court based on diversity of citizenship and an amount in controversy of more than $50,000, pursuant to 28 U.S.C. § 1332 (1988).

BN filed a motion for partial summary judgment on October 14, 1990, arguing that as a matter of law, Section 434 of the FRSA, in conjunction with MUTCD and other crossing safety rules and regulations, preempted plaintiff's claims of negligence in failing to install additional warning devices. Pet. App. at 21-22, 26-29. The district court denied BN's motion for partial summary judgment on February 7, 1991. 757 F. Supp. 1198 (D. Kan. 1991), Pet. App. at 14-40. Following certification of an interlocutory appeal under 28 U.S.C. § 1292(b) (1988), the Tenth Circuit

reversed the judgment on March 6, 1992. 958 F.2d 320 (10th Cir. 1992), Pet. App. at 1-11.

D. Decisions Below

In its Memorandum and Order, the district court adopted a modified version of the preemption theory espoused by the Ninth Circuit in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983). The district court held that preemption was not triggered "until the responsible state agency made a determination regarding the type of warning device to be installed." Pet. App. at 35. The court expressed concern that a contrary conclusion would create "a gap in the duty to protect against unreasonably dangerous crossings between the time the referenced regulations were promulgated by the Secretary and a formally enforceable decision was made by the state as to the proper device to be used at a particular crossing." *Id.* at 32. In this case, the grade crossing had been scheduled in 1985 for eventual improvement, but the selection of the particular type of traffic control device was not formally made or approved by the State until December 28, 1987. *Id.* at 38. Thus, in the district court's view, no "determination" by the state agency had been made until after the September 29, 1987 accident and no preemption of the railroad's duty had occurred.

In reversing the district court, the Tenth Circuit held that, under the express terms of the FRSA, any common law duty of railroads to erect warning devices was pre-empted when the Secretary of Transportation adopted the MUTCD. *Id.* at 4-11. The court pointed out that "all traffic

control devices proposed for railroad crossings must comply with the uniform federal standards expressed in the MUTCD." *Id.* at 7 (citing 23 C.F.R. § 646.214(b)(1)). Further, the MUTCD "circumscribes the authority to determine what 'devices' shall be erected at a grade crossing to 'the public agency with jurisdictional authority.' " *Id.* at 8 (quoting MUTCD, ¶ 8A-1). The MUTCD also made "the 'installation and operation' of such devices subject to the determination of that agency." *Id.* (quoting MUTCD, ¶ 8A-1). Thus, "until a determination of need is made, no new device can be installed or operated at the crossing." *Id.*

The Tenth Circuit rejected the district court's attempt to place liability on the railroad during the period between promulgation of the MUTCD or other regulations and the installation of additional traffic control devices. In particular, the Tenth Circuit held that the district court had overlooked significant portions of the MUTCD in concluding that no regulation prohibited a railroad's independent erection of traffic control devices in the period before state-mandated improvements are approved or installed. *Id.* at 8. For example, the district court had disregarded ¶ 8D-1 of the MUTCD, which required approval "from the appropriate agency within a given state" before a new or modified grade crossing traffic control system could be installed. *Id.* at 9. The Tenth Circuit also cited K.S.A. 8-1512, which prohibits erection of "unauthorized" signs or signals. *Id.* at n.6.

Finally, the Tenth Circuit observed that the FRSA created a "prospective-looking system" which "contemplates that some sites are more dangerous than others and that resources should first be put to use on the more

dangerous ones, all in accordance with a rational scheme based on surveys." *Id.* at 10. Continued reliance on common law standards after a state had adopted the MUTCD disrupts a basic purpose of the FRSA by imposing a "hit-or-miss common law method" which "runs counter to a statutory scheme of planned prioritization." *Id.* The court concluded that "[a]ll § 434 requires for preemption to occur is the adoption of the standard, and the MUTCD contains the standard." *Id.* at 11. "Postponing the determination of what specific device is required for a given grade crossing is simply a matter of implementing that standard." *Id.*

Upon the denial of his suggestion for rehearing en banc, Petitioner filed his Petition for Writ of Certiorari. Respondent agrees with Petitioner that "even if *certiorari* is granted in *Easterwood*, Petitioner's case should also be considered by this [C]ourt in order to fully clarify the area of grade crossing safety, and in particular the role of the MUTCD." Petition at 9.

REASONS FOR GRANTING THE WRIT

As this Court recognized by granting certiorari in *Easterwood*, federal preemption of the railroads' state tort duty to erect traffic control devices at grade crossings is a subject of national importance. In amicus briefs in *Easterwood*, the Solicitor General on behalf of the United States, and the Association of American Railroads on behalf of the railroad industry, underscored the need for definitive guidance in this area, which has produced a

host of conflicting decisions in the federal and state courts.

In *Easterwood*, the principal reason given by the court of appeals for the absence of preemption was that the Secretary of Transportation "has not promulgated any regulations regarding grade crossings under his general power to regulate railroad safety." 933 F.2d at 1555. Thus, the *Easterwood* argument will provide this Court with an opportunity to decide the threshold question of whether the regulations requiring states to adopt and adhere to the MUTCD are "regulations . . . relating to rail safety" within the meaning of 45 U.S.C. § 434 and can therefore provide a basis for preemption.

This case poses an equally important question – assuming that the Secretary's regulations pertaining to the MUTCD fall within the express preemptive provisions of the FRSA, when does preemption occur? This issue, too, has divided the federal and state courts. It is of vital importance in almost every trial in which federal preemption of a railroad's common law duty to erect additional traffic control devices is asserted. And it is presented through atypical facts in *Easterwood*.

This case provides an ideal vehicle for resolving that issue, for two reasons. First, this case presents the issue in the context of clearly defined and wholly typical facts. The circumstances of this case – where the grade crossing had been scheduled for improvement but that action had not yet been implemented at the time of the accident – are representative of the fact pattern in large numbers of other reported and unreported cases. The recurrence of this pattern is to be expected in a statutory scheme that

requires long-term scheduling and prioritization of projects. By examining the scope of preemption in the context of these classic facts, the Court can gain greater insight into the operation of the federal scheme and can provide more useful guidance to the state and federal courts.

Second, in this case there is a clear indication that the railroad could not proceed to make the improvements without final state authorization. Not only did federal regulations preclude the railroad from taking unilateral action, but the district court specifically found that state authorities had cautioned the railroad against doing so. Thus, this case provides an ideal vehicle for examining the railroad's dilemma.

Easterwood already bears a heavy burden. It must, at a minimum, resolve both the question of whether the Secretary's regulations requiring adoption of the MUTCD fall within the FRSA and the separate question of whether any common law duty of negligence with regard to train speed is preempted by federal regulations relating to maximum train speed on particular classes of track. This case provides an excellent vehicle in which to hear an additional, focused argument as to *when* preemption arises in a typical, representative fact situation. For that reason, respondent Burlington Northern Railroad Co. acquiesces in the petition and urges that this case be scheduled for argument in connection with *Easterwood*.

I. THIS CASE PRESENTS THE CLASSIC FACT PATTERN IN WHICH A PUBLIC AUTHORITY HAS DECIDED TO UPGRADE THE TRAFFIC CONTROL DEVICES AT A CROSSING, BUT HAS NOT YET IMPLEMENTED THAT DECISION

The facts in this case have broader applicability than those which appear to be at issue in *Easterwood*. According to the Eleventh Circuit, "[t]he record [in *Easterwood*] reflects that due to various financial constraints and logistical problems, the state wanted to upgrade the site but was unable to perform the upgrade."[3] *Easterwood*, 933

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[3] It is not clear how the appellate court in *Easterwood* reached its view of the facts. The record apparently indicates that the city had objected to the state's recommendation to install gate-arms because that would have required the construction of traffic-islands which would have inhibited tractor-trailer movement at nearby vehicular intersections. *Easterwood* Petition at 5 (Nov. 15, 1991). GDOT "ultimately decided *not* to add gate-arms to the warning equipment at Cook Street but instead upgraded the crossing's electronic train detection devices." *Id.*

Thus, the district court determined that the public authority "made a decision not to install gate arms at the Cook Street crossing when it transferred the funds to other projects and removed the Cook Street crossing from the list of crossings to receive gate arms." 742 F. Supp. 676, 679 (N.D. Ga. 1990). In the district court's view, this constituted "a federal decision in accordance with federal law." *Id.*

The Eleventh Circuit did not indicate that the district court's fact-finding was clearly erroneous, but treated the case as one in which there was an "absence of a decision by a federally designated policymaker." *See Easterwood*, 933 F.2d at 1555-56.

F.2d at 1555. The Eleventh Circuit concluded that this constituted "a policymaker's failure to act" and that this "is insufficient to constitute preemption." *Id.* Thus, "because the state has neither upgraded the grade crossing nor affirmatively decided that the existing crossing was adequate, we have no occasion to decide whether a federally sponsored upgrade would insulate the railroad from liability." *Id.* at 1556. The Eleventh Circuit concluded that, "in the absence of a decision by a federally designated policymaker, state common-law liabilities are not affected by the federal highway aid provisions." *Id.*

In contrast, this case presents a different, but typical, fact situation – one in which the public authority with jurisdiction over the crossing has determined that additional traffic control devices should be installed, but has not finally implemented the upgrade at the time of a crossing collision. This is probably the most common fact pattern among courts grappling with the extent of federal preemption of railroads' tort duty to provide traffic control devices.[4]

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[4] *See Armijo v. Atchinson, T. & S. F. Ry.*, 754 F. Supp. 1526, 1529 (D. N.M. 1990) (state evaluation had included crossing within five-year plan for improvements and indicated that flashers and gates would be installed, but as of date of accident, devices had not been installed at crossing, and preliminary engineering report had not been requested concerning installation); *Nixon v. Burlington Northern R.R.*, No. CV 85-384-BLG-JFB, 1988 WL 215409, at *2 (D. Mont. May 2, 1988) (state, county and railroad had agreed to install flashing light signals with automatic gates at crossing where accident occurred, but

(Continued on following page)

Courts have addressed this situation with varying conclusions regarding federal preemption. In *Barger*, for example, an Ohio Court of Appeals determined that preemption had occurred when the particular crossing was targeted for an upgrade and had been scheduled for modernization, a situation similar to the facts in this case. Although there is no indication that a particular warning device had been selected for the crossing, the court of appeals held that the decision to upgrade the crossing triggered federal preemption. *Barger*, 590 N.E.2d at 1371. On the other hand, in *Armijo*, the federal court reached the same conclusion as the Tenth Circuit in this case, holding that Section 434 of the FRSA, in conjunction with the standards adopted in the MUTCD, generally preempted state law in this area. *Armijo*, 754 F. Supp. at 1531. Conversely, on the same facts in *Runkle*, the Montana Supreme Court rejected preemption entirely. *Runkle*, 613 P.2d at 990-91.

These decisions reflect the larger debate among the federal circuits and other courts over the point at which federal preemption is triggered under Section 434. While

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decision apparently had not been implemented at time of collision); *Barger v. Chesapeake & O. Ry.*, 590 N.E.2d 1369, 1371 (Ohio Ct. App. 1990) (state agency had targeted crossing for warning upgrade, but upgrade had not been implemented at time of collision); *Runkle v. Burlington Northern*, 613 P.2d 982, 990 (Mont. 1980) (prior to accident, state officials met with local officials and railroad, determining that crossing required flashing signals and short-arm gates, but "[t]he installation of these safety devices may have been awaiting the red tape procedure that inheres in any federal funding project when the fatal accident in this case occurred").

the Tenth Circuit has found preemption through promulgation of the MUTCD, the Eighth Circuit has apparently concluded that no preemption at all results from the federal regulations regarding railroad crossings, *Karl v. Burlington Northern R.R. Co.*, 880 F.2d 68, 75-76 (8th Cir. 1989), and the Ninth Circuit has indicated that preemption will occur only where "a federal decision is reached through the local agency on the adequacy of the warning devices at the crossing" or a "determination under the manual regarding the type of warning device to be installed at the crossing" is made. *Marshall*, 720 F.2d at 1154. Even among those courts that have followed *Marshall*, courts have reached varying conclusions as to the point at which preemption occurs.[5]

The fact pattern of this case – involving a period between the state's decision to upgrade a crossing and the final implementation of that decision – is generated by the very structure of the federal regulatory scheme. Under that scheme, each state must conduct and systematically maintain a survey of all highways to identify the crossings requiring upgrades. 23 U.S.C. § 130 (1988).

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[5] *See Anderson v. Chicago C. and P. R.R.*, 771 F. Supp. 227, 229 (N.D. Ill. 1991) (finding no preemption under *Marshall*, *Karl* or Illinois law where defendants had not argued that state agency "made any determination as to the appropriate warning devices" at crossing); *Walker v. St. Louis-Southwestern Ry.*, No. 59816, 1992 WL 137587, at *3 (Mo. Ct. App. June 23, 1992) (citing *Marshall* for proposition that preemption occurs "[w]hen a Federal decision is reached regarding the adequacy of crossing warning devices through a local agency," court found preemption had occurred when state had inspected crossing and determined that standard crossbuck sign was sufficient).

States must establish priorities for implementing the safety improvement projects which have been developed. 23 C.F.R. § 924.9(a)(1)-(4) (1991). Once states have prioritized the safety improvement projects pursuant to specified factors, they must schedule and implement the projects in accordance with the established priorities. *Id.* at § 924.9.

A natural consequence of planning and prioritization under the federal crossing safety scheme is the existence of time periods between the decision to upgrade a crossing and the final implementation of that decision. The upgrade of a particular crossing may await funding and installation of warning devices at crossings higher up on a state's list of priorities. It is during this interim that the federal preemption issue typically will arise. This case thus presents the Court with a set of facts whose recurrence is inherent in the nature of the federal crossing safety structure. Certiorari should be granted to permit a fuller exploration of this representative case, without the additional complicating issues presented in *Easterwood*.

II. THIS CASE ALLOWS CONSIDERATION OF PREEMPTION WHEN A PUBLIC AUTHORITY HAS CAUTIONED AGAINST INDEPENDENT ACTION BY A RAILROAD

The facts in this case also would allow the Court to consider the preemption issue in the circumstances where a public authority has expressly directed the railroad not to proceed with installation of the traffic control devices and a state statute expressly prohibits the erection of unauthorized signs and signals.

This issue has already arisen in at least one other case, which also concluded that when a railroad has been directed *not* to act independently in erecting additional warning devices, it should not be liable for its failure to do so. *See Moore v. Atchison, T. & S. F. Ry.*, No. 90-0360-CV-W-1, 1991 WL 343378, at *2 (W.D. Mo. May 7, 1991) (railroads could not be liable for inadequacy of warning devices when railroads under state law "were not then and are not now free to alter, modify or upgrade the warning devices without the Commission's express permission"), *aff'd*, 1992 WL 110795 (8th Cir. May 28, 1992).

The record in this case establishes that the KDOT had, upon authorizing BN to order necessary materials for upgrading its warning devices, cautioned BN that "the actual installation of the warning devices cannot be undertaken until the agreements are executed by all parties and we have authorized you to proceed." *See* Appendix to this Response at App. 2. That warning carried special weight in light of Kansas law, which provides that "[n]o person shall place, maintain or display upon or in view of any highway any *unauthorized* sign, signal, marking or device which purports to be or is an imitation of or resembles an official traffic-control device or railroad sign or signal." K.S.A. 8-1512(a) (emphasis added).[6] Kansas' scheme explicitly conforms with the most recent edition of the MUTCD, which requires approval "from the appropriate agency within a given state" before a new or

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[6] A "person" is defined by the statute to include a corporation. *Id.* at 8-1447.

modified grade crossing traffic control system can be installed. *Id.* § 8-2003; *see* MUTCD ¶ 8D-1.

Granting certiorari in this case thus will allow this Court to address the impact of preemption where there is express direction to a railroad *not* to act independently to install traffic control devices at a crossing.

III. THE FACTS IN THIS CASE UNDERSCORE THE NEED FOR FEDERAL PREEMPTION OF A STATE LAW TORT DUTY TO ERECT TRAFFIC CONTROL DEVICES

The facts in this case bring into sharp focus the reason for FRSA preemption of state common law duties relating to grade crossing traffic control devices. As the Tenth Circuit recognized, jury verdicts based on common law standards are necessarily ad hoc, case-by-case judgments, predicated upon the assumption that the determination of the particular protective device to be installed at each individual crossing is the duty of the railroad. *See* Pet. App. at 10-11. This cannot be reconciled with the federal statutory scheme.

The heart of the federal grade crossing safety program is the systematic upgrading of traffic control devices at crossings pursuant to a prioritization schedule established by state authorities under criteria specified by federal regulations. This program necessarily contemplates that upgrading at those crossings determined to be of lower priority will not occur immediately, and that there will be a time period between the time that the state decides that additional devices should be added and the

time that such devices are actually installed. The imposition of state tort liability on a railroad for failure to install additional traffic control devices at a crossing during this time period, contrary to the state's priority determination, would play havoc with that statutory scheme and is preempted under the FRSA.[7]

Enacted in 1970, the FRSA was in large measure a response to a wave of serious railroad accidents – including grade crossing collisions – that occurred in the late 1960s.[8] Congress broadly preempted state law relating to railroad safety where the Secretary of Transportation had adopted regulations covering the subject matter. 45 U.S.C. § 434. Of the numerous areas of railroad safety, only one was afforded specific treatment in the FRSA, and that was the area relating to the problem of grade crossing safety, to which a specific section of the Act was devoted.[9] In

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[7] This is not, of course, a bar to all common law suits against a railroad arising out of a grade crossing accident. In this case, for example, plaintiff has alleged, *inter alia*, that the railroad crew were negligent in failing to sound the whistle as they approached the crossing. This claim remains for determination by the jury at trial. Other issues typically raised in grade crossing accidents include failure to keep a proper lookout, failure to timely apply the brakes, failure to sound the bell, failure to maintain the traffic control devices, and excessive speed (over limits prescribed by the Federal Railroad Administration).

[8] *See* H.R. Rep. No. 1194, 91st Cong., 2d Sess. 8-10 (1970), *reprinted in* 1970 U.S.C.C.A.N. at 4104, 4106-07 ("House Report").

[9] The legislative history of the FRSA explains Congress' focus on rail crossing safety:

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that section, Congress first required the Secretary of Transportation to undertake a "comprehensive study of the problem of eliminating and protecting railroad grade crossings." 45 U.S.C. § 433(a). It then directed the Secretary to "undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem." *Id.* § 433(b); *see* Pet. App. at 4. To carry out this latter mandate, Congress instructed the Secretary to utilize not only the authority granted to him under the FRSA, but his authority over "highway, traffic, and motor vehicle safety, and highway construction" as well. *Id.*[10]

Upon receipt of the Secretary's report, Congress amended the federal Highway Safety Act to require each state to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require . . . protective devices, and establish and implement a schedule of projects for this purpose." 23

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> The Committee is aware that grade crossing accidents constitute one of the major causes of fatalities connected with the rail operations. The need to do something about these terrible accidents which have one of the highest incidents of death and serious injury per accident, necessitates an immediate attack on the grade crossing problem as soon as possible.

House Report at 19, *reprinted in* 1970 U.S.C.C.A.N. at 4116.

[10] Consistent with this instruction, the Secretary delegated his responsibility for addressing the grade crossing safety problem to the FHWA. *See* 49 C.F.R. § 1.49(m) (1991). It is to the FHWA regulations one must therefore turn to determine whether the Secretary has "cover[ed] the subject matter" of grade crossing warning devices.

U.S.C. § 130(d) (1988). Other sections of the Highway Safety Act (involving separate federal funding sources) contain parallel provisions.[11]

FHWA regulations precisely dictate the manner by which states must discharge their statutory responsibilities concerning grade crossings. In planning crossing improvement projects, states must: (1) collect and maintain accident, highway and train traffic data; (2) analyze the data collected in order to identify hazardous grade crossings; (3) conduct engineering studies of the hazardous crossings identified in order to develop safety improvement projects; and (4) establish priorities for implementing the safety improvement projects which have been developed. 23 C.F.R. § 924.9(a)(1)-(4) (1991). The federal regulations delineate specific criteria to be applied by the states in their prioritization of improvements to protective devices:

> § 924.9 *Planning.*
>
> (a) The planning component of the highway safety improvement program shall incorporate:
>
> * * *

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[11] *See, e.g.*, 23 U.S.C. § 152(a) (1988) (requiring each state to conduct and maintain an engineering survey of all public roads to identify hazardous locations, assign priorities for correction of such locations, and establish and implement a schedule of projects for their improvement); 23 U.S.C. § 402(a) (1988) (requiring each state to have a highway safety program adopted in accordance with uniform guidelines promulgated by the Secretary).

> (4) A process for establishing priorities for implementing highway safety improvement, projects, considering: (i) The potential reduction in the number and/or severity of accidents, (ii) The cost of the projects and the resources available, (iii) The relative hazard of public railroad-highway grade crossings based on a hazard index formula, (iv) Onsite inspection of public grade crossings, (v) The potential danger to large numbers of people at public grade crossings used on a regular basis by passenger trains, school buses, transit buses, pedestrians, bicyclists, or by trains and/or motor vehicles carrying hazardous materials, and (vi) Other criteria as appropriate in each State.

Once states have prioritized the safety improvement projects pursuant to these factors, states must schedule and implement the projects in strict accordance with the established priorities. *Id.* at § 924.9.

The vehicle for requiring states to adopt the prioritization program contemplated by the statute is the MUTCD. In the MUTCD, adopted at 23 C.F.R. § 655.603(a), the Secretary established the national standard for rail-highway grade crossing improvements.[12]

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[12] With federal aid projects involving the elimination of hazards at railroad-highway crossings, "[a]ll traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards." 23 C.F.R. § 646.214(b)(1).

The section devoted to "Traffic Control Systems for Railroad-Highway Crossings" is specific in its requirement that the state authorities (and not the railroads) be responsible for surveying and making the determination of the need for upgrading protection at each individual rail-highway grade crossing:

> 8A-1 Functions. * * * *The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority.* Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.
>
> * * *
>
> 8D-1 Selection of Systems and Devices. The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations. * * * Due to the large number of significant variables which must be considered there is no single standard system of active traffic control devices universally applicable for grade crossings. Based on an engineering and traffic investigation, a determination is made whether any active traffic control system is required at a crossing and, if so, what type is appropriate. *Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within any given State.*

MUTCD ¶¶ 8A-1, 8D-1 (emphasis added). As the Tenth Circuit recognized, this regulation "effectively prohibits a railroad from acting on its own to select and install a safety device" and "absolves the railroad of any independent duty regarding grade crossing safety devices." Pet. App. at 9.

Kansas has specifically adopted the MUTCD standards, including the requirement that new traffic control devices must receive prior state approval. *See* K.S.A. 8-2003; Kan. Admin. Regs. 82-7-4(c). And the record in this case clearly reveals the control exercised by the State in determining not only *what* devices should be installed, but also *when* they should be installed. *See* pp. 5-6, *supra*. This implements the federal requirement that grade crossing improvements be carried out pursuant to the priorities established by public authorities.

This statutory scheme cannot be reconciled with the continued imposition of state tort liability on railroads for failure to install a protective device *not* contemplated by the state's priority determination. As the Tenth Circuit recognized, a "basic purpose of FRSA" is the "recognition of priorities." "FRSA contemplates that some sites are more dangerous than others and that resources should first be put to use on the more dangerous ones, all in accordance with a rational scheme based on surveys." Pet. App. at 10. Whether particular protective devices should have been installed at a particular crossing at a particular time is thus a matter for the state to decide in its priority determination – not a matter to be decided by a jury in a personal injury case.[13]

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[13] Congress fully appreciated the fact that the federal laws and regulations required the states to gather grade crossing data in order to determine whether and to what extent grade crossings were in need of additional warnings. To ensure that responsibility was carried out fully, and without fear of lawsuits, Congress enacted a statutory prohibition which precludes discovery and use of such data in both federal and state courts. 23 U.S.C. § 409.

Moreover, the FRSA system of prioritization necessarily contemplates that there will be periods during which additional devices will *not* be installed at those crossings accorded lower priority by the decision-making authorities. Indeed, a state's assignment of a low priority to a particular crossing is an implicit determination that additional protective devices should not be installed at that crossing until those needed at higher-priority crossings have been completed. The interval between the time a decision is made to upgrade and the actual installation is thus an integral part of the prioritization system mandated by the federal regulations.

Thus, even without express preemption, a compelling case could be made for preemption because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Elec. Co.*, 496 U.S. 72, 75 (1990) (citation omitted). In fact, however, the preemptive effect of the FRSA is both explicit and broad. Under Section 434, once the Secretary issues "a rule, regulation, order or standard" covering any facet of rail safety, including grade crossings, any state laws or standards covering the same subject matter are preempted.[14]

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[14] In view of the express preemption provision in the FRSA, plaintiff's reliance on cases such as *Abbot v. American Cyanamid Co.*, 844 F.2d 1108 (4th Cir.), *cert. denied*, 488 U.S. 908

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Where Congress acts under its constitutional authority over an area within its jurisdiction (*e.g.*, the railroad industry) to define explicitly the extent to which its enactments preempt state law, states are precluded from interfering in any way with the federal scheme. *English*, 496 U.S. at 75. It makes no difference whether the state law in question is based on a statute, an ordinance, a facet of the state's common law or an award of state law tort damages. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

By virtue of the FRSA's express preemption provision, 45 U.S.C. § 434, "Congress [has] explicitly define[d] the extent to which it intends to pre-empt state law." *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984). In so doing, Congress clearly manifested its unwillingness to provide the states any broader role because it "d[id] not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." House Report at 11, *reprinted in* 1970 U.S. C.C.A.N. at 4109. The courts of appeals have recognized

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(1988), and *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991), is misplaced. In *Abbot*, the Court found that Congress did not intend, either expressly or impliedly, to preempt state law with respect to vaccine design and labeling. Similarly, in *Wisconsin Public Intervenor*, the Court found that the Federal Insecticide, Fungicide and Rodenticide Act left substantial portions of the field of pesticide regulation vacant, including the issue of local governmental schemes for permits and the actual use of pesticides.

that 45 U.S.C. § 434 should be construed to strictly limit state regulations concerning rail safety.[15]

The Secretary's promulgation of the MUTCD clearly constituted the adoption of a rule, regulation, order or standard covering the subject of grade crossing safety. As previously demonstrated, the upgrading of grade crossing protective devices pursuant to a state-determined prioritization is an integral part of that safety program. Prioritization necessarily contemplates that some grade crossings will not receive additional protective devices immediately – and the determination of which crossings are to receive particular devices at particular times is now the responsibility of the state authorities, not the railroads. Placing that responsibility upon the states who are responsible for regulating and controlling the movement of motor vehicles on their roadways is not only required

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[15] *See, e.g., Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1122 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973) (holding that the FRSA authorizes only a "narrow spectrum of deviation from national uniformity"); *National Ass'n of Regulatory Util. Comm'rs v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976) (Section 434 evinces a "total preemptive intent," and even if a state statute is involved, if it is of state-wide application, it perforce cannot address a "local hazard"); *Burlington Northern R.R. v. Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989) ("The FRSA does not merely preempt those state laws which impair or are inconsistent with [federal] regulations. It preempts all state regulations aimed at the same safety concerns addressed by the [federal] regulations.") (footnote omitted); *CSX Transp., Inc. v. Public Utils. Comm'n*, 701 F. Supp. 608, 612-13 (S.D. Ohio 1988), *aff'd*, 901 F.2d 497 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 781 (1991) (legislative history of the FRSA leaves a "clear record of Congressional intent for virtually complete federal preemption in the area of railroad safety laws").

under the MUTCD, it places the responsibility where it belongs. Railroads are not the experts in controlling vehicular traffic on the states' highways and roads. State laws imposing such responsibilities on the railroads through tort liability conflict with the unambiguous provisions of the MUTCD, destroy national uniformity and frustrate the grade-crossing safety improvement program.

CONCLUSION

Granting certiorari in this matter would augment significantly this Court's ability to analyze federal preemption of the railroads' duty with respect to traffic control devices in the most typical situation. Respondent thus acquiesces in the Petition for Writ of Certiorari in this matter and asks that the argument of this case be heard in tandem with *Easterwood*.

Respectfully submitted,

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APPENDIX

DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
EXHIBIT 3

[66]

STATE OF KANSAS

[SEAL]

KANSAS DEPARTMENT OF TRANSPORTATION
Docking State Office Building
Topeka 66612-1568
(913) 296-3566

Horace B. Edwards
Secretary of Transportation

Mike Hayden
Governor of Kansas

March 11, 1988

Project No. 8 X-1132-01
RRS-000S (802)

Crossing of the
Burlington Northern Railroad
Company's tracks and FAS-77 (Haverhill Road)
in Butler County

Mr. G. G. Albin
Chief Engineer
Burlington Northern Railroad Company
3253 East Chestnut Expressway
Springfield, MO 65802

Dear Mr. Albin:

Reference is made to our letter of December 28, 1987, transmitting the agreements and plans for the above project to your office. By the Federal Highway Administration procedures, we have the authority to authorize

the Company to order materials and to proceed with the work at the appropriate time.

By this letter you are authorized to order materials necessary for the warning devices. However, the actual installation of the warning devices cannot be undertaken until the agreements are executed by all parties and we have authorized you to proceed.

Very truly yours,

/s/ Robert G. Cutter
for CHIEF, BUREAU OF DESIGN

RGC:NDR:ckb

cc: Mr. James V. Bush, Director of Engineering & Design
Mr. D.M. Testa, Chief, Bureau of Construction & Maintenance
Mr. Dale Jost, Chief, Bureau of Fiscal Services
Mr. W.A. Culwell, District Engineer, Hutchinson
Mr. R.G. Cutter, Coordinating Engineer

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